JAN 13 1896
CLERK.

In the Supreme Court of the United States.

Brief of Hill Harris & Birch Opp's Con Petn

OCTOBER TERM, 1895.

No. 818

Filed Jan. 13, 1896.

ROWENA M. CLARKE ET AL.

vs.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Bill, Dependent Bills, &c.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA

vs.

THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.

THE FARMERS LOAN AND TRUST CO. OF NEW YORK

vs.

THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.

Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.

ANSWER AND BRIEF IN REPLY TO

Petition of Central Railroad & Banking Company of Georgia et al. for Certiorari from Decree of Circuit Court of Appeals for the Fifth Circuit.

It is a wise maxim never to lay down a principle of wider application than is warranted by the matter in hand.—Macaulay.

HILL, HARRIS & BIRCH,

Solicitors for Respondents.

ROWENA M. CLARKE ET AL. *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	Bill, Dependent Bills, &c.
THE CENTRAL R. R. AND BANKING CO. OF GEORGIA *vs.* THE FARMERS LOAN AND TRUST CO. OF NEW YORK ET AL.	Intervention of the Virginia & Alabama Coal Co. and Sloss Iron and Steel Company.
THE FARMERS LOAN AND TRUST CO. OF NEW YORK *vs.* THE CENTRAL R. R. AND BANKING CO. OF GEORGIA ET AL.	

ANSWER AND BRIEF OF HILL, HARRIS & BIRCH IN REPLY TO

Petition of Central Railroad & Banking Company of Georgia et al. for Certiorari from Decree of Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE.

The decision of the Circuit Court of Appeals is reported in 66 Fed. Rep. 803.

The syllabus is as follows:

1. RAILROAD RECEIVERSHIPS—PAYMENT FOR SUPPLIES.

The C. Ry. Co., in June, 1891, was leased to the R. Ry. Co., which went into possession, and operated the C. Ry. Co. lines until March, 1892, when a receiver of the C. Ry. Co. was appointed, and took possession of its property. After the lease, and before the receivership, a contract was made for a supply of coal to the C. Ry. Co., under which coal was delivered both within six months before and after the receivership, some of which was used before the receivership, and some was on hand when the receiver was appointed, and was taken and used by him, and some was delivered to and used by him. *Held*, that, without regard to who made the contract, the coal having been furnished for and used in the operation of the C. Ry. Co.'s lines, for the purpose of carrying on its business, the receivers should be directed to pay not only for that which had been delivered to them, but for that which had previously been delivered to the road and used, either before or after the receivership.

2. SAME. PAYMENT FROM CORPUS OF ESTATE.

It appeared that before the receivership there had been a diversion of income for the payment of interest on bonds, and that the receiver expended for betterments, out of the income, a sum larger than the claim of the sellers of the coal. *Held*, that payment for the coal should be made out of the corpus of the property, if the income was insufficient.

The statement of the case by the Circuit Court of Appeals, is as follows:

"This is a suit brought by intervention for coal furnished by the intervenors, the Virginia & Alabama Coal Company and the Sloss Iron & Steel Company, for the operation of the Central Railroad & Banking Company of Georgia while being operated by the Richmond & Danville Railroad Company. All the coal charged for as furnished before the appointment of receivers for the Central Railroad Company was furnished within less than six months prior to such appointment. The Central Railroad was leased to the Georgia Pacific Railroad Company; the Georgia Pacific was leased to the Richmond & Danville Railroad Company; and the latter company, under color of this lease, was operating the Central Railroad lines. On June 1st, 1891, the Central was leased to the Georgia Pacific Railroad Company; and on the same day the Richmond & Danville, (to which the Georgia Pacific was already leased) went into the possession of the Central and operated the same till March 4th, 1892, at which date the receivers of the Central were appointed. The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such cash and credits as were then due, and on the other hand obligating the lessees to pay the current debts of the lessor company for supplies, etc. *The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central. It appears from the agreed statement of facts that the semi-annual interest on the $5,000,000 of mortgage bonds of the Central was paid in January, 1892, (the order appointing the Receiver being dated March 4th, 1892.) It is also an agreed fact that during the receivership the Central expended for betterments on its railroad lines, from the income of the roads during the receivership, a sum much larger than the entire claim of the intervenors.* To set aside the lease, Mrs. Rowena M. Clarke, a stockholder, brought her bill against the Central Railroad under which a receiver was appointed March 4, 1892. The Richmond & Danville and Georgia Pacific Companies disclaimed any rights under the lease, and no issue was raised in relation thereto such as to require decision as to the validity or invalidity of the lease, and such question has not been determ-

ined. Shortly afterwards the Central Railroad filed a dependent bill, under which the same receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad. The Farmers' Loan & Trust Company, the trustee for the mortgage bondholders of the Central Railroad, afterwards filed its dependent bill in said cases, under which the same receivership was continued. All these cases were afterwards consolidated. On July 13, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract stipulated for 90 cents per ton of 2,000 pounds, to be delivered on cars at the mines, and to be shipped at times and in quantities to suit. In pursuance of this contract the Virginia Company, between September 16, 1891, and March 4, 1892, shipped to the Division Superintendents (Curran, at Macon, Dill, at Savannah, and Epperson, at Augusta), coal to the amount (per contract 90 cents per ton) of $26,607.44. The Sloss Company, under the same contract, by the consent of both parties, supplied coal to the amount of $14,359.38, but at an agreed price of 95 cents a ton. All bills were made out in the name of the Central Company. The price at which the Central Railroad got the coal was 7 or 8 cents per ton less than the market price at that time. It appears that while much of the coal was used in the operation of the Central Railroad prior to the receivership, a large part of the coal delivered was in its bins at the time of the appointment of the receivers on March 4, 1892, and went into their possession and was used by them, and that some of the coal was received after that time, and likewise went into the possession of the receivers. *An agreement of counsel is found in the record as follows: 'It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the intervenor to the railroad lines of the Central Railroad & Banking Company of Georgia, which was being operated by the Richmond & Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown by said exhibits.'* It, however, appears that some of the coal delivered to the Central Railroad was used by several other railroads known as the Port Royal & Augusta, the Port Royal and Western Carolina and the Charlotte, Columbia & Augusta Railroads. The Master's Report finds that coal of the Virginia Company worth $13,735.89 was used prior to the receivership; that coal worth $6,700.50 was in the bins at the time of the appointment of the Receiver, and that coal worth $6,171.30 was received by the Receiver after his appointment, and that, of the coal of the Sloss Company, coal worth $10,320.17 was used prior to the appointment of the Receiver; that coal worth $3,818 was in the bins March 4, 1892, and that coal worth $776 arrived after the appointment of the receivers. The Circuit Court held the Central Railroad and the receivers liable only to the extent of the

coal which was delivered after March 4th, 1892, (holding them liable at the contract price,) and rendered a decree accordingly. From that decree the intervenors appealed."

OBJECTIONS TO STATEMENT OF THE CASE MADE BY PETITIONERS.

1. It is stated on page 3 of the petition that "a succinct statement of the facts and issues in the case, *as presented to the Circuit Court of Appeals*, is hereto attached as Exhibit B, and made part of this petition."

Exhibit B is a reproduction of the statement of the case made in the briefs of counsel for the Central Railroad Company, in the Circuit Court of Appeals, except that it superadds at the end thereof the following new paragraph :

"(23.) It is not true, as petitioners are advised, that it appears from the record that there was a diversion of the income from the earnings of the leased railroad to the payment of the interest on the bonds of the Central R. R. & B. Co. of Georgia, in January, 1892, within the meaning of the rule in Fosdick's case. What the record discloses is that the lessee had transferred to it, under the lease, not only the road, but the income from several million dollars of stocks and bonds owned by the Central Company, which was more than sufficient to pay the interest on its mortgage debt (printed transcript, pp. 23, 29). And that the lessee agreed to pay, as part of the rental, the interest on the mortgage indebtedness of the Central Company (printed transcript, p. 34), and that the interest on the mortgage debt falling due in January, 1892, was paid. This is the full extent of the stipulation in the record on this point (printed transcript, p. 15, clause 14). The contention of the Central Company, as made by the record, is that the income of the railroad during that period was appropriated by the Danville Company, and that issue is pending elsewhere (printed transcript, p. 10)."

The same point is urged in the petitioner's briefs, page 4, par. 10.

But an examination of the statement of the case and brief of the argument made in the Circuit Court of Appeals by the appellee (the petitioner here) will show that NO SUCH CONTENTION WAS INTIMATED OR URGED IN THAT COURT.

Even if it were admissible now to make this new contention, it is enough to say that the record does not support it.

The references made by petitioner are to pages 23 and 29 of the printed record. (The agreed statement of facts ends on page 19.) Nothing is shown by these references to the lease except that by its terms the Central turned over certain stocks and bonds to the lessee company. There is no evidence whatever that the latter company ever received one dollar of income therefrom; paragraph 23 above quoted rests upon a mere inference, wholly unauthorized; an inference not even suggested in the Circuit Court of Appeals.

2. Objection is made to the following statement on page 2 of the petition:

"Petitioners aver that while in and by the said opinion and judgment said Circuit Court of Appeals has committed manifest error, in a matter involving a considerable amount in the particular intervention in which the judgment is rendered, yet this expresses but a very small part of the results of the judgment as it affects these petitioners, as there are numerous other intervening petitions and proceedings pending in the main cause of similar character amounting to several hundred thousand dollars, seeking to subject the trust property in the hands of the Receivers of the Central Railroad & Banking Company of Georgia to their payment, the proper disposition of which turn upon a correct decision of the same legal question involved in this cause, and a review of which on *certiorari* is sought by this petition."

A statute of Georgia, hereinafter quoted in full, gives a lien upon the gross income of a railroad in the hands of a receiver in favor of creditors "for the incidental expenses necessary to the carrying on of said business, which shall include the wages of employees, wood, cross-ties and other material furnished," etc.

In our brief in the Circuit Court of Appeals (page 23) we said:

"Although the decisions are not reported, yet, inasmuch as they are known to opposing counsel in this case, it is permissible to state that the court below has construed this Georgia statute to refer to the payment of current debts for supplies, etc., contracted prior to the appointment of the receiver; and in pursuance of that construction the court has given judgment against the Central and its Receivers for wood and other materials furnished to the Richmond and Danville while it was operating the Central, and which the Danville used in the operation of the Central. It is also proper to state that the court below distinguished his ruling in such cases from the decision which is the subject of the present appeal; though we are wholly unable to see the distinction."

Counsel for Appellees (the petitioners here) replied to the brief, but took no issue with the statement of fact above made.

In the nature of the case, it is difficult to meet a general statement, such as that now under consideration; but, as counsel practicing in the court in which this case originated, we have seen numerous orders made by the court directing the Receivers of the Central to pay for materials furnished the Richmond & Danville while it was operating the Central; and while our knowledge of the matter is only general in its character, we know of no appeals from such orders. But we submit that the importance of the case to the party applying for a writ of *certiorari* is not material: that this is not a case of general importance, we have argued, at the conclusion of this brief.

BRIEF OF THE ARGUMENT.

We here print the decision of the Circuit Court of Appeals, now sought to be reversed: (66 Fed. Rep. 805-7.)

"Before PARDEE and MCCORMICK, Circuit Judges, and TOULMIN, District Judge.

"TOULMIN, District Judge, after stating the case as above, delivered the opinion of the Court.

"From what appears in the record we are satisfied that the debts claimed by the intervenors for coal delivered prior to the appointment of the Receivers, were current debts for operating expenses of the Central Railroad lines, made in the ordinary course of business, to be paid out of the current earnings. The coal was purchased in the name of the Central Railroad. It was delivered on its lines, and was furnished for their operation, and, with the exception of a small amount, was used by them. There was evidence that the contract for the purchase of the coal was made by the Central Railroad, and the Master so found. The Circuit Court, however, differed with and overruled the Master in such finding.

"In our view of the case, it makes no difference whether the contract for the purchase of the coal was made by the Central Railroad or by the Richmond & Danville Railroad. The coal was delivered on the lines of the Central Railroad, and was furnished for and used in their operation. The Richmond & Danville Railroad Company had the possession of the Central Railroad lines, was operating them, collecting their revenues, and was under the obligation to pay out of their earnings the current expenses and the interest on their bonds. But whether that pos-

session was lawful or otherwise, or whatever the relations between the two Railroads may have been, we think that the Central Railroad was liable for the necessary supplies furnished and used for the purpose of keeping its road in successful operation, and carrying on its business as a common carrier. Such debts are preferential, and the persons to whom they are due are entitled to have the income of the Receivership used in the payment of them, as the Railroad Company would have been bound in equity and good conscience to use it if no change in the possession of the property had been made. *Farmers' Loan & Trust Co. vs. Kansas City, W. & N. W. R. Co., 53 Fed., 182; Burnham vs. Bowen, 111 U. S., 776, 4 Sup. Ct., 675; Fosdick vs. Schall, 99 U. S., 235.* In this case the equities are especially favorable to the intervenors, for it appears that there was a diversion of the income for the payment of the interest on bonds of the Central Railroad, in January, 1892, some two months before the Receivers were appointed; and it also appears that the Receiver expended from the income for improvements on the railroad property a sum much larger than the claims of the intervenors. Our opinion is, that the Receivers are liable not only for the coal which they received after their appointment from unloaded cars, but that they are equally liable for the coal which was in the bins at the date of their appointment, and which they took possession of and used in the operation of the Central Railroad lines, and that, as representatives of the Central Railroad & Banking Company of Georgia, they are also liable for the coal delivered to and used by the Central Railroad lines prior to their appointment, and which was then unpaid for. For that portion of the coal used at Augusta by the three railroads there, as shown by the evidence, the Central Railroad and the Receivers are liable, except as to that used by the Charlotte, Columbia & Augusta Railroad. It appears that the other roads mentioned were under the control of the Central Railroad and were a part of its system. The Charlotte, Columbia & Augusta Railroad was not. It does not appear that the Court, in appointing the Receivers, made any provision for the payment of the intervenor's claims, but as there is evidence in the record showing that current earnings, before the Receivers were appointed, were diverted to paying interest on the bonded debt, and that after their appointment they made large permanent improvements on the railroad property, the intervenors should be allowed payment of their claims from the corpus of the property, should the earnings in the hands of the Receivers be insufficient to pay them.

"The intervenors are only allowed the price stipulated for, and which they expected to receive, when the coal was delivered, and which is, in fact, the price claimed in their petition of intervention. In our opinion, the view which the Circuit Court took of this case was an erroneous one, and the decree must be reversed, and the case is remanded to the Circuit Court with in-

structions to enter a decree in favor of the intervenors for the amounts respectively due them for coal delivered to the lines under the control and forming a part of the system of the Central Railroad & Banking Company of Georgia, as shown by the evidence in this case, including the coal furnished before the appointment of the Receivers, and that found in the bins at the time of such appointment, and of which the Receivers took possession, as well as the coal delivered to the Receivers after their appointment, the amount due being determined by the contract price, and an order that they recover from the Central Railroad & Banking Company of Georgia and the Receivers of the same, such sums thus found to be due. No decree will be entered in favor of the intervenors for the payment of that portion of the coal which was used by the Charlotte, Columbia & Augusta Railroad Company.

"Reversed and remanded."

It is to be noted that the decision was unanimous.

WHAT IS THE TRUE LEGAL EFFECT OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The petitioners state the decision of the Circuit Court as follows, (petition, page 4):

"It is now for the first time laid down as a rule that when a railroad company leases its road to another company, it does so with the understanding that upon the abrogation or termination of the lease, the entire supply indebtedness and operation expenses of the lessee company which it may through accident or design leave unpaid becomes a charge and lien upon the property of the lessor company."

We respectfully submit that this is an erroneous statement of the ruling made by the Circuit Court of Appeals.

That ruling cannot properly be interpreted except in connection with the facts of the case. The above statement leaves out of sight three important elements of the decision. It is not to be assumed that the Court violated the maxim which limits the application of a principle to the "matter in hand."

(*a*) Although the Court did not rest the case on the fact that the contract for the coal was made with the Central, (though the Court states that there was evidence to show this, and the Master so found,) the Court does call attention to the agreed fact that the *delivery* of the coal was *to* the lines of the Central. (Record,

page 144,) and was "furnished and used in their operation," and the Court finds as a fact that "*the coal was purchased in the name of the Central Railroad.*"

(*b*) "It appears that there was a diversion of the income for the payment of the interest on the bonds of the Central Railroad, in January, 1892, some two months before the Receivers were appointed."

(*c*) "It also appears that the Receivers expended from the income for improvements on the railroad property a sum much larger than the claim of the intervenors."

It cannot be fairly claimed that the Circuit Court of Appeals has laid down a rule that is not limited by the facts in the case upon which the decision rests. So construed, the decision does not warrant the petitioners' representation of its legal intendment, but may be stated as follows:

Where it appears that one railroad was operating another under color of a lease and that the coal used in running the engines of the lessor company was (not furnished to the lessee company as part of the coal used in operating its system of railroads but) furnished and delivered specifically to the lines of lessor company; and where the lessee company diverted its income from the payment for such coal to the payment of the interest on the lessor company's bonds; and where shortly after such payment, a Receiver of the lessor company was appointed at the instance of a stockholder assailing the lease (neither the lessee nor lessor asserting its validity), which Receivership was extended to bills filed by the lessor company for liquidation and by the mortgage creditor for foreclosure; and where it was made to appear that a large part of such coal was on the bins of the lessor company when the Receiver took charge and that he used the same — that some of it was in transit and was received and used by the Receiver — that the remainder had been delivered to the lessor company only a few months prior to the appointment of the Receiver; and where it further appears that the Receiver had used for betterments on the railroad property a portion of the income greatly in excess of the claims of the creditors who supplied such coal; *Held*, that the entire claim for such coal is a preferential debt, to be charged in the first instance upon the income, and secondarily upon the corpus of the railroad property of the lessor Company.

In support of the foregoing proposition, we submit the following argument and authorities:

The Richmond and Danville Railroad Company (hereafter called the Danville), being in possession of the franchises and properties of the Central, whether legally or illegally, had the right to bind the Central for supplies necessary to its operation.

(*a*) It is settled law that the lease of one railroad to another does not affect any of the obligations which the lessor company owes to the public; and one of its obligations is to continue the exercise of its franchises. In performing this obligation, it is

absolutely necessary that supplies should be furnished for the operation of the railroad, and the lessee company has the right to bind the lessor by contracts for the purchase of supplies where the lessor has transferred to the lessee the duty of exercising its franchises and operating the railroad as a carrier.

The only doubtful point that could arise with respect to the liabilities of leased railroads is whether or not the lessor company would be liable to persons who might be injured by negligence in its operation and whose right to recover for such negligence depended on no contract. It is settled law that the lessor is liable in such cases.

> Singleton vs. the Southwestern Railroad, 70 Ga., 470.
> Redfield Law of Railway, 616.

It follows, *a fortiori*, that if the right of recovery exists independent of the contract, it certainly exists where, in addition to the general public obligation, the right of recovery is given by contract binding the lessor through the agency of the lessee. To reason otherwise would seem to violate all logic. If the lessee is such an agent of the lessor that the lessor is liable for torts committed by the employees of the lessee, how much more will that agency make the lessor liable for contracts made in the name of the lessor for supplies necessary to perform its charter obligations?

(*b*) If the lease or the possession of the Central by the Danville was unlawful, nevertheless the Central would be bound by the contract made on its behalf by the officers of the Danville.

The Circuit Court for the Southern District of Georgia has so ruled in the case of the Macon Foundry and Machine Works against the defendants in this case, and we quote the ruling in part as follows:

> "The Central Railroad & Banking Company deliberately through the action of its Board of Directors, transferred its entire property to the Georgia Pacific Railway Company, an insolvent corporation, in absolute violation of the law, and instantly, without a syllable of writing, turned over the entire property, not to the Georgia Pacific, but to the Richmond & Danville Railroad Company, which then operated it, collected all of its revenue and diverted the income in that way from the proper channel, and therefore held this property in contemplation of law as a trespasser. Now, the Central Railroad did that.
>
> "The State had the right to expect, as I have said, that it would keep its property going as a great system of transportation, as was originally designed. The parties who took the property found it necessary, of course, to carry on the business of railroad transportation. In order to do that, they found it necessary to keep up the material equipment of the road. It was the duty of the defendant company to carry on the business; and if it selected, lawfully or otherwise, an agent to carry on the business for it, it is none the less responsible for the debt thus created, and it cannot primarily shift the obligation on the Richmond & Danville Railroad Company. The State had the right to expect when it chartered the Cen-

tral Railroad, that it would perform its duties to the public, and one of these duties was the payment of debts due and contracted for the purpose of carrying on its business as a transportation company."

(This case has not been reported, but the foregoing extract is copied from the opinion, of file in the office of the Clerk of the Court.)

It is not necessary to cite authority on the proposition that a railroad company is bound to maintain its operation. We refer, however, to the case of Gates against the Boston and New York Air Line Company, 24 Am. and Eng. Ry. Cases, 147, in which the Court says:

"Upon principle it would seem plain that the railroad property once devoted and assigned to public use, must remain pledged to that use; so as to carry to full completion the purpose of its creation, and that this public right existing by reason of the public exigency, demanded by the occasion and created by the exercise of the powers of the State, is superior to the property rights of coporations, stockholders and bondholders. To this effect also is the weight of authority."

Being under this obligation, the Central surrendered its property and franchises to the Danville, who took it under color of a lease from the Central Railroad to the Georgia Pacific. Under this state of facts we think the true rule of law is embodied in the following proposition:

The rule in Fosdick *vs.* Schall applies, although the creditor furnishing the supplies necessary to the operation of a railroad, furnished them in pursuance of a contract made with the officer of another corporation to which the railroad company had illegally surrendered its franchises and property by which corporation it was being operated. The Railroad Company, its stockholders and bondholders, who by the act of the majority and the acquiescence of the minority, placed in possession of the railroad, a lessee, in violation of law, will not be heard to defeat the equity of a supply creditor who furnished supplies necessary for the operation and actually used in the operation of the Railroad Company, to such pretended lessee upon the faith of the earning capacity of the railroad in pursuance of a contract made with such pretended lessee. In such case the lessee, even though illegally in possession and control of the railroad, is so far the agent of the Railroad Company as to bind it by contracts for supplies necessary for its operation; and especially where (as the Court finds to be the fact here) the contract was made in the name of the leased Company.

If this contract is to be repudiated, loss must fall upon the party who parted with a valuable consideration on the faith of that contract, while on the other hand, if the contract is enforced, a liability will be asserted as against the corporation and against its stockholders and bondholders.

If loss must fall upon one or the other of these two parties, it must in equity fall upon those who held out to the public the illegal agent; who put him in a position where he could say that he was authorized to bind the Railroad Company; who could induce parties to contract with him upon the faith of the earning capacity of the road.

Otherwise, if the Central Railroad Company and its stockholders and bondholders were allowed to repudiate this contract, they would be allowed to take advantage of their own wrong and of their own illegal action. If any other rule is adopted than the one now contended for, the result would be that the Central Railroad would be allowed to plead its own wrong when sued by a party who furnished supplies to enable it to carry out its charter obligations.

The authority of an illegal lessee as the agent of the lessor has been expressly upheld in the case of *Ottawa, Oswego & Fox River Valley Railroad Company vs. Black, 97 Illinois, 262*, in which the head-note is as follows, the head-note being the same as the language of the decision, on page 267:

"If a Railroad Company, without any authority to do so, leases its road to another company, the lessee will only be regarded as the servant of the company owning the road, and such company will not be by the act of leasing discharged from its contracts or released from any of its liabilities." To the same effect is the case of Hays against the same railroad, *61 Illinois, 123*.

II.

The foregoing considerations acquire force when considered in connection with the diversion of the Central's income made by the Danville to the payment of the interest on the Central's bonds.

INCOME DIVERTED TO INTEREST AND IMPROVEMENTS.

The income of the Central was diverted to the payment of interest on bonds of the Central prior to the Receivership and during the time that the coal was being delivered: and after the Receivership a larger amount than the Intervenors' debts was used in making improvements upon the Central lines.

To this effect is the agreed statement of facts. (Record, page 15, clauses 14 and 15).

In the case of *Burnham vs. Bowen, 111 U. S., 776*, the Court held even in a case where there had been no diversion by the company or by the Receiver of the current earnings for the payment of interest on bonds, a debt incurred over eleven months before the appointment of the Receiver, for coal used in the com-

pany's locomotives, should be paid out of the income of the Receiver upon the ground that it was such a debt as it would have been the company's duty to pay out of the net earnings if Receiver had not been appointed.

The equity declared in the case of Fosdick vs. Schall cannot be destroyed by a lease. It exists either against the Central or the Danville. Does it exist against the Danville? If so, on what grounds? The railroad operated by the use of the coal was the Central. The bonds on which the interest was paid by the Danville were the Central's. The Receiver who took the unconsumed coal on the lines was the Central's. With what color of equity, could these creditors have asserted that theirs was a preferential debt against the income and property of the Danville?

If, therefore, these intervenors should resort, as the counsel for the Central insisted in the Court below they should resort, to the Court which appointed the Receivers of the Danville, and ask that these coal debts be paid out of the property or earnings of the Danville under the rule in Fosdick vs. Schall, they would be met by the statement that the earnings of the Central which might otherwise have been applied by the Danville to the payment of these coal debts, had been applied to the payment of interest on the bonds of the Central, and that therefore that the proper forum in which to have recovery for these debts is that in which the Receivers of the Central were appointed. It seems to us that this reply would be conclusive.

Even if there had been no diversion of income for the payment of interest on bonds: it would be enough that the income had been diverted for the payment of improvements on the railroad property.

Persons who furnish labor, supplies and materials to a railroad, in order to keep it a going concern, are entitled to payment out of earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or *permanent improvements*, whereby the bondholders have been benefited, the Court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the Receiver, or, failing these, out of the proceeds of the sale.

Finance Co. of Pennsylvania vs. Charleston, C. & C. R. R. Co., 48 Fed. Rep., 188.

The case under review was reported February 25th, 1895. It has been cited with implied approval. *Northern Pacific R. R. Co. vs. Lamont, 69 Fed. Rep., 25.* It has not been criticized or questioned.

III.

CASES CITED BY PETITIONER REVIEWED.

A comparison of the brief filed in the Circuit Court of Appeals by the appellee, and the same party (petitioner) here shows that every case now relied on was brought to the attention of that Court, (except one, 139 U. S., 24, which has no application ;) and every contention now relied on was made, except the one already shown to be unauthorized by the evidence.

1. The cases of *Quincy Company vs. Humphreys 145 U. S., 82, and U. S. Trust Company vs. Wabash Ry. 150 U. S., 287*, involve only the question of the adoption of an existing lease by reason of the retention of possession of the leased railroad by a Receiver. They have no bearing on this case. If they have any bearing, it is adverse to the petitioner.

(*a*) The Court recognized the separate divisions of the Wabash system and directed the accounts so kept as to throw upon each division its respective liabilities, and only to permit payment upon its bonds when income exceeded expenses.

If in that case a supply creditor had asserted an equity against a single division for supplies furnished to and used by it exclusively, it would have been in accord with the entire theory of the Court's administration to have decreed that payment thereof be made by that division.

(*b*) The Court ordered the entire amount of preferential debts exisiting at the time of the receivership paid in preference to the mortgage.

(*c*) "The immense debt for supplies and other preferential claims here precludes the inference that there was any such diversion of earnings applicable to the payment of rentals." *145 U. S., 103*

Here the Circuit Court finds as a fact that diversion was made of earnings applicable to the payment of these supply debts.

2. The case of *Transportation Co. vs. Pullman Co., 139 U. S., 24*, does not sustain the point on which it is cited and is wholly without application. The true rule is laid down in *Ottawa Co. vs. Black, 97 Ill., 262, supra.*

3. *Clyde against the Richmond & Danville Railroad Company, 56 Fed. Rep., p. 540.* On examining this case it will be seen to have no application. The *ratio decidendi* of that case is embraced in the following statements:

1st. In that case the intervenor had sued the Richmond & Danville Company *alone*; and had elected that company as her debtor and had merged her claim in a judgment against that company. (See page of Decision, 542.) The case here is wholly different.

2d. No question could be made in that case as to the obligation of the Railroad Company to which the supplies were furnished, for the reason that that railroad was not a party to the case before the Court (which is not true here, because the Central, which is the railroad for which the supplies were furnished, is a party to this case;) and also because in the Clyde case the mortgagees were not parties to the suit. That is not true here, because the mortgagees are parties and have filed their bill in this case as dependent upon the original Rowena M. Clarke bill, and in their dependent bill asked the Court to continue the same Receivership, which was done and which case has been consolidated by order of the Court with the other cases in which the interventions were filed: and their counsel unite in the agreed statement of facts on which the case is heard. (Record, p. 19.)

IV.

THE DECISION RIGHT UPON OTHER GROUNDS.

The judgment of the Court of Appeals may be sustained upon other grounds than those on which it is rested. If so, this petition should be denied.

1. The decision is right because it was clearly shown that *the contract for this coal was made specifically and exclusively with the Central.*

See statement of the evidence in the brief filed for intervenors in the Circuit Court of Appeals, page 3 to 6, and discussion, page 12. Copies of that brief are filed herewith.

2. The decision was right upon the further ground that *it was required by the statute of Georgia.* The Act of 1876, page 122, embodied in the Code of Georgia, 278 (a), is as follows:

"*An Act to define the duties and fix the liability of Receivers appointed for Railroad Companies, in certain cases, and to create liens in favor of certain creditors, and provide for the enforcement of such liens, and for other purposes.*

Duties of Receivers of Railroads.

"SECTION 1. *Be it further enacted, etc.*, That in all cases where the business of any corporation operating a railroad either wholly or partially in this State, shall by an order or decree of any court, be placed in the hands of a receiver for the benefit of the creditors or stockholders of said corporation, it shall be the duty of said receiver to apply the income of said railroad to the payment of the incidental expenses necessary to the carrying on said business, which shall include the wages of employees, wood, cross-ties and other material furnished, and which may be necessary for conducting said business and keeping the property in repair, and the damages which may arise from the loss or injury to goods, wares and merchandise received by said road for transportation, and for injuries to persons and property caused by the running of the cars on said road, and for which said road is now liable, as common carriers, by the laws of this State, and a lien is hereby created on the gross income of said road, while in the hands of such receiver, in favor of such creditors or claimants, superior to all other liens under the laws of this State.

Lien in favor of creditors.

How paid.

"SEC. 2. *Be it further enacted*, That if said receiver should be removed, or a vacancy occur in said office, and a successor be appointed, it shall be his duty to pay the liens herein provided for, according to their date, out of any funds in his hands as such receiver, whether such liability accrued before or after his appointment."

It has already been stated that the judge of the District Court (sitting as Circuit Judge,) for the Southern District of Georgia, has construed this statute to apply to debts existing at the time of the Receivership "for expenses necessary to carrying on the business," etc.

In the Circuit Court of Appeals it was argued by the appellee that this Act must be construed as if intended to alter the rule laid down in *Henderson vs. Walker, 55 Ga., 481*, as follows:

"Receivers of a railroad holding possession for a Court of Chancery and operating the road under the orders of that Court, are not subject to suit in their official capacity, for a personal injury to one of their employees, resulting from the negligence of others of their employees in the same service."

And it was claimed that since this case was reaffirmed in *Thurman vs. Railroad, 55 Ga., 376*, in January, 1876, just one month prior to the act above quoted, that statute should be construed as intended to remedy the "evil" in that decision and others analagous to it; and that it was limited to liabilities arising during the Receivership.

This argument appeared to have some force; and it may be that for that reason the Circuit Court of Appeals failed to rest its decision upon this local law, as well as the equity in *Fosdick vs. Schall;* but the whole force of the argument against the application of the statute has been, since the decision in the Circuit Court of Appeals, overcome by a later decision of the Supreme Court of Georgia holding that the Act of 1876 did not affect the cases of *Henderson vs. Walker* and *Thurman vs. Railroad.*

The decision rendered August 9th, 1895, not yet reported, is as follows:

Patterson vs. The Central Railroad & Banking Company et al.

1. The above stated cases are controlled by the decisions of this Court in the cases of *Henderson vs. Walker et al., Receivers, 55 Ga. 481*, and *Thurman vs. Cherkee Railroad Company, 56 Ga. 376*, holding that when a railroad company is in the hands of, and being operated by a Receiver, neither the Company nor the Receiver is subject to suit by an employee for personal injuries occasioned by the negligence of an employee.

2. As the rule announced in the above stated case has stood as good law for about twenty years, and the General Assembly has passed no act changing the same and the majority of this Court are of the opinion that they were correctly decided in the first instance, they are upon a review of the same hereby confirmed.

Atkinson, J., being bound by the rulings in the cases cited, concurs in the judgments rendered, but dissents from the majority opinion in declining to overrule those cases.

3. The decision was right upon the further ground that if the Central was not bound by the contract, the intervenors were entitled to recover from the Receiver for the coal in the bins, which he kept and used, the market price of the coal at the places of delivery.

This was as much as the value of all the coal at the contract price.

See discussion in Brief in Circuit Court of Appeals, pages 29-32, inclusive.

THE CASE NOT OF GENERAL IMPORTANCE.

This Court has laid down the rule with reference to the petitions of character, as follows:

"In the same spirit, the authority conferred on this Court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew's Case, 140 U. S., 583 and 144 U. S., 47; In re Woods 143 U. S., 202.* Accordingly, while there have been many applications to this Court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's case, above cited, which involve a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner, No. 1237* of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the district Judge, and was dissented from by one of the three Circuit Judges; and in each of those cases the Circuit Court of appeals had declined to certify the question to this Court."

Amer. Const. Co. vs. Jacksonville Railway, 148 U. S., Rep. 372, page of decision 383-4.

This case cannot be brought within this rule.

1. It is a case of peculiar facts. Ordinarily, a mine owner supplying coal to a railroad system would give credit to the company operating the system; the coal would be distributed promiscuously among the branches of the system; no proof would exist as to what portion was used on a particular line. But here, for very special reasons, the mine owner contracted specifically with and for a particular line and the proof is absolute as

to the use of the coal by that line. (See discussion in brief in Circuit Court of Appeals, p. 3-5, 12-13; and the agreement of counsel, Record, p. 85.)

2. The "forced reorganization of railroad properties now taking place throughout the country" is a belated argument. It is judicially known to the Court, as a part of the public history of the country, that these reorganizations have in the main already taken place; and the amount of mileage under control of Railroad Receiverships has already been very greatly reduced. For instance, in Georgia a few years ago, every railroad but one was in the hands of a Receiver; now there is but one in Receiver's hands.

Walter B. Hill.
Sole for Respondent